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Citation Information

Salyzyn, Amy. "Another One Bites the Dust! Bolstered Law Offices and a Blocked Taxman in Chambre des notaires du Québec." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 81. (2019).

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Another One Bites the Dust! Bolstered Law Offices and a Blocked Taxman in *Chambre des notaires du Québec*

Amy Salzyn*

I. INTRODUCTION

In *Canada (Attorney General) v. Chambre des notaires du Québec* the Supreme Court once again vigorously defended a lawyer's obligation to preserve confidential client information.¹ The Court's recent interest in solicitor-client privilege is significant. Since 2006, the Court has heard at least 10 cases dealing with solicitor-client privilege, about the same number it heard during that period related to each of sections 15 and 2(b) of the *Canadian Charter of Rights and Freedoms* ("Charter").² The Court's language in these cases reinforces the perception that the Court views solicitor-client privilege as extraordinarily important. Among other things, the Court has described solicitor-client privilege as "one of the most ancient

* Faculty of Law, University of Ottawa. An earlier draft of this article was presented to the 20th Annual Constitutional Cases Conference at Osgoode Hall Law School on April 7, 2017. The Author thanks the attendees of this conference for their helpful feedback as well as Vanessa MacDonnell and Alice Woolley for their thoughtful suggestions.

¹ *Canada (Attorney General) v. Chambre des notaires du Québec*, [2016] S.C.J. No. 20, 2016 SCC 20, [2016] 1 S.C.R. 336 (S.C.C.) [hereinafter "*Chambre des notaires*"].

² Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. In his leading text on solicitor-client privilege in Canada, Adam Dodek observes "[b]etween 1999-2013, the Supreme Court of Canada rendered no less than thirteen decisions in cases directly involving the privilege" (A. Dodek, *Solicitor-Client Privilege* (Markham, ON: LexisNexis Canada, 2014), at 15 [hereinafter "Dodek"]). The statistic used in this article uses the cases cited by Professor Dodek between 2002-2013 and adds the additional cases that have been rendered since 2013: *Chambre des notaires*, *id.*; *Canada (National Revenue) v. Thompson*, [2016] S.C.J. No. 21, [2016] 1 S.C.R. 381, 2016 SCC 21 (S.C.C.) [hereinafter "*Thompson*"]; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, [2016] S.C.J. No. 53, [2016] 2 S.C.R. 555, 2016 SCC 53 (S.C.C.) [hereinafter "*University of Calgary*"]; *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] S.C.J. No. 7, 2015 SCC 7 (S.C.C.) varg *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2013] B.C.J. No. 632 (B.C.C.A.) [hereinafter "*Federation of Law Societies*"].

and powerful privileges known to our jurisprudence” and as having an “importance...to our justice system [that] cannot be overstated.”³

One major preoccupation in the Court’s recent decisions on solicitor-client privilege has been the question of when and how the government may statutorily interfere with the privilege. The Court provides strong protection for privileged material, precluding any statutory interference unless expressly authorized.⁴ It further prohibits any exercise of statutory authority that might interfere with solicitor-client privilege unless “absolutely necessary in order to achieve the ends sought by the enabling legislation.”⁵ An additional layer of protection for privileged material now exists as a result of the Court’s “constitutionalization” of solicitor-client privilege in the early 2000s. The Court classifies the privilege as a principle of fundamental justice and recognizes that a client has a reasonable expectation of privacy of “the highest order” in relation to documents protected by solicitor-client privilege for the purposes of sections 7 and 8 of the Charter, respectively.⁶

In *Chambre des notaires*, the constitutional implications of solicitor-client privilege were again squarely before the Court. The case dealt with the constitutionality of a regime under the *Income Tax Act* that required legal professionals, upon request, to send client documents and information to tax authorities. The regime also declared that solicitor-client privilege did not cover lawyers’ accounting records notwithstanding the fact that such records might otherwise be considered privileged at common law. The regulatory body for notaries in Quebec, the *Chambre des notaires*, challenged the law under both sections 7 and 8 of the Charter, although, as discussed below, the Court held that consideration of section 7 was unnecessary after finding a violation of section 8 that could not be justified under section 1.

³ The first quotation is from *R. v. National Post*, [2010] S.C.J. No. 16, at para. 39 (S.C.C.), and inspiration for its inclusion here comes from Adam Dodek’s highlighting of this phrasing in Dodek, *id.* The second quotation is from *University of Calgary, id.*, at para. 26.

⁴ *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] S.C.J. No. 45, [2008] 2 S.C.R. 574 (S.C.C.) and *University of Calgary, supra*, note 2.

⁵ *Descôteaux v. Mierzwinski*, [1982] S.C.J. No. 43, [1982] 1 S.C.R. 860 (S.C.C.); *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.J. No. 31, 2006 SCC 31 (S.C.C.); *University of Calgary, id.*

⁶ The two cases establishing these statuses are *R. v. McClure*, [2001] S.C.J. No. 13, [2001] 1 S.C.R. 445, 151 C.C.C. (3d) 321 (S.C.C.) (section 7) and *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2002] S.C.J. No. 61, 2002 SCC 61, 167 C.C.C. (3d) 1 (S.C.C.) (section 8) [hereinafter “*Lavallee, Rackel & Heintz*”]. For commentary discussing the “constitutionalization” of solicitor-client privilege, see M. Jamal & B. Morgan, “The Constitutionalization of Solicitor-Client Privilege” (2003), 20 S.C.L.R. (2d) 213 and A. Dodek, “Reconceiving Solicitor-Client Privilege” (2010), 35 *Queen’s L.J.* 493-538.

At one level, not much is new in *Chambre des notaires*. The Court's treatment of solicitor-client privilege under section 8 is largely consistent with its previous jurisprudence. The decision, however, is still worthy of extended analysis. The Court's reasons crystallize the tension resulting from its characterization of solicitor-client privilege as a substantive rule not to be interfered with unless "absolutely necessary" and its parallel efforts to constitutionalize the status of this rule under a Charter right that allows for "reasonable" searches and seizures. Considered together with last year's ruling in *Federation of Law Societies*,⁷ this decision confirms that the Court's recent attempts to insulate the lawyer-client relationship from government interference by using individual Charter rights results in some awkward jurisprudential gymnastics. More broadly, *Chambre des notaires* demonstrates that to evaluate governmental attempts to legislate in relation to the lawyer-client relationship requires assessing the principle of lawyer independence. Consequently, it pushes us to adopt a clearer understanding of what "independence" means than currently exists in the case law, particularly for constitutional purposes.⁸

II. BACKGROUND

The facts of *Chambre des notaires* are straightforward. At issue was a procedure (commonly referred to as the "requirement procedure") in the *Income Tax Act* ("ITA") whereby tax authorities can require that a person send them any information or document for any purposes related to the administration or enforcement of the Act.⁹ A failure to comply with a notice received under this procedure can result in a fine of up to \$25,000 and imprisonment of up to 12 months.¹⁰

⁷ *Federation of Law Societies of Canada*, *supra*, note 2.

⁸ Indeed, a number of commentators, including myself and Alice Woolley, have recently argued this in relation to the Court's prior jurisprudence dealing with government regulation of lawyers. See, for example, A. Woolley, "Lawyers and the Rule of Law: Interdependence of the Bar, the Canadian Constitution and the Law Governing Lawyers" (2015) 34 NJCL 49-74 [hereinafter "Woolley, 'Lawyers and the Rule of Law'"]; A. Woolley, "Fundamental Justice (Sort of Maybe) Requires a Lawyer's Commitment to a Client's Cause" (2015) 34 NJCL 211-214 [hereinafter "Woolley, 'Fundamental Justice'"]; A. Salyzyn, "A False Start in Constitutionalizing Lawyer Loyalty in *Canada (Attorney General) v. Federation of Law Societies of Canada* (2016) 76 S.C.L.R. (2d) 169 [hereinafter "Salyzyn, 'A False Start'"]].

⁹ *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 231.2(1).

¹⁰ *Id.*, s. 238(1).

The constitutionality of a previous, substantially similar, version of the requirement procedure was upheld by the Supreme Court in the 1990 case of *R. v. McKinlay Transport*,¹¹ in relation to its application to taxpayers. The current case arose because, beginning in 2002, notaries practising law in Quebec started to receive notices under the requirement procedure demanding information or documents related to their clients.¹² Not surprisingly, this generated concerns from notaries about breaching their clients' rights to professional secrecy. Ultimately, the regulatory body governing notaries — the *Chambre des notaires du Québec* — brought a declaratory action seeking to have the procedure, as it applied to notaries, declared unconstitutional. The *Chambre* also requested that 17 classes of documents that notaries commonly possess or prepare — including, for example, marriage contracts and wills — be declared *prima facie* privileged. The *Barreau du Québec* joined the proceeding for the purposes of having the requested declaration apply also to the lawyers that it licenses.

Although this case arose because of events in Quebec, tax authorities had begun to issue requirement notices of this type to lawyers across Canada.¹³ The fact that *Chambre des notaires* began in Quebec is nonetheless consequential because, technically speaking, the decision deals with the constitutional implications of the civil law doctrine of “professional secrecy”, understood to be “enshrined in Quebec’s *Charter of Human Rights and Freedoms*”,¹⁴ rather than the common law doctrine of solicitor-client privilege.¹⁵ To the extent that there are distinctions in these doctrines — particularly in relation to their sources — such distinctions do not materially impact the Court’s discussion in this case and its impact on the law going forward. Writing for the Court in *Chambres des notaires*, Wagner and Gascon JJ. note that, “we are of the view that there are strong similarities between the common law’s

¹¹ [1990] S.C.J. No. 25, [1990] 1 S.C.R. 627 (S.C.C.).

¹² *Mémoire des Appelants, Procureur général du Canada et Agence du revenu du Canada*, at para. 6.

¹³ See, for example, the following cases in which the Federal Court considered whether client-related documents requested from a lawyer under the requirement procedure were privileged: *Canada (Minister of National Revenue) v. Jakobfy*, [2013] F.C.J. No. 797, 2013 FC 706 (F.C.) (Ontario lawyer); *Canada (Minister of National Revenue) v. Singh Lyn Ragonetti Bindal LLP*, [2005] F.C.J. No. 1907, 2005 FC 1538 (F.C.) (Alberta lawyer); *Canada (Minister of National Revenue) v. Reddy*, [2006] F.C.J. No. 348, 2006 FC 277 (British Columbia lawyer).

¹⁴ *Barreau du Québec*, “Professional Secrecy”, online: <<http://www.barreau.qc.ca/en/public/relation/secret/>>.

¹⁵ For a helpful discussion of the doctrine of professional secrecy in relation to solicitor-client privilege, see Dodek, *supra*, note 2, at 85.

solicitor-client privilege and professional secrecy in the civil law.”¹⁶ Indeed, the justices’ reasons treat the doctrines as inter-changeable.¹⁷

Three specific provisions of the ITA were at issue in the proceedings. The first provision, section 231.2(1), enables tax authorities to send a demand to any person requiring that they send them any information or any document.¹⁸ The one major constraint in this section is that the demand must be for a purpose “[relating] to the administration or enforcement” of the ITA.¹⁹ The second provision, section 231.7, sets out a procedure to allow the Minister of National Revenue to obtain a court order in a case where a person does not comply with a demand sent pursuant to section 231.2(1).²⁰ In order to make such an order, the judge must be satisfied both that the person at issue in fact did not comply and that the documents or information at issue are not protected by solicitor-client privilege.²¹ In considering whether privilege applies, the judge is directed to apply the definition of solicitor-client privilege as found in the ITA.²²

¹⁶ *Chambre des notaires*, *supra*, note 1, at para. 42.

¹⁷ For example, in the opening paragraphs of decision, the justices state that “the professional secrecy of notaries and lawyers” is “otherwise known as solicitor-client privilege” (*Id.*, at para. 2).

¹⁸ *Supra*, note 9. This provision reads in full as follows:

Requirement to provide documents or information

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

- (a) any information or additional information, including a return of income or a supplementary return; or
- (b) any document.

¹⁹ *Id.*

²⁰ *Id.* This provision reads in part:

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

- (a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and
- (b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

²¹ *Id.*

²² *Id.* This provision reads in part:

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

The third provision before the Court, section 232(1), contains the relevant definition of solicitor-client privilege, which states:

solicitor-client privilege means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, *except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.*²³ (emphasis added)

Because legal professionals received no special treatment under this regime, the above provisions enabled tax authorities to demand that lawyers or notaries send them client information or documents. The regime did not require any notice to clients when demands were being made to their legal professional. There was also no requirement that documents or information requested from a lawyer's or notary's office first be vetted for solicitor-client privilege, either by the legal professional or a judge, before being sent to tax authorities. In order for privilege to be claimed, the lawyer or notary would have to refuse to comply with a demand and then defend this refusal at a subsequent hearing. Additionally, if such a hearing is held, there is the possibility that the court will order the disclosure of client information or documents that would otherwise be protected by solicitor-client privilege at common law because section 232(1) deems all lawyer accounting records not to be privileged. At common law, a lawyer's accounting records are not considered to be categorically or necessarily privileged but do, in certain cases and circumstances, obtain the protection of solicitor-client privilege. Accounting records can, for example, include descriptions about why a client retained a lawyer or be organized in such a way that aspects of the lawyer's legal strategy are revealed.²⁴ Whether something in a lawyer's file is privileged depends "not on the type of document it is but, rather, on its content and on what it might reveal about the relationship and communications between a client and his or her...lawyer."²⁵

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- (a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and
 - (b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

²³ *Id.*, s. 232(1).

²⁴ *Chambre des notaires, supra*, note 1, at para. 74.

²⁵ *Id.*, at para. 73.

III. LEGAL PROCEEDINGS

At first instance, Blanchard J.C.S. of the Quebec Superior Court held that the provisions at issue were unconstitutional and thus of no force or effect in relation to notaries and lawyers in Quebec.²⁶ He also granted the Chambre's request that certain classes of documents be declared *prima facie* privileged in relation to the procedure. The Quebec Court of Appeal upheld this ruling, except for Blanchard J.C.S.'s declaration that certain documents be declared *prima facie* privileged.²⁷

Although the Chambre alleged both section 7 and section 8 violations, both courts below rested their conclusions on section 8 alone. The same was true before the Supreme Court of Canada.²⁸ With respect to section 8, the Court dealt with the first question of whether a seizure had taken place relatively quickly, noting its previous holding in *McKinlay* that a requirement under section 231(3) constitutes a seizure for the purposes of section 8.²⁹ Notwithstanding the dispositive nature of this holding in *McKinlay*, the Court also took pains, in its consideration of this first question, to emphasize the significant privacy expectations that attach to privileged information. In doing so, the Court noted, among other things, professional secrecy's status as a "fundamental and substantive" rule of law with "deep significance" and reiterated the proposition that it "should not be interfered with unless absolutely necessary given that it must remain as close to absolute as possible".³⁰

The Court rejected the submission by the Attorney General and the Canada Revenue Agency that the civil and administrative context of the requirement procedure diminished a client's expectation of privacy in privileged information and documents.³¹ On this point, the Court concluded, citing its previous jurisprudence, that "...[t]he protection afforded to professional secrecy in the context of a s. 8 analysis is invariably high regardless of whether the seizure has occurred in a criminal or an administrative context."³²

²⁶ *Chambre des notaires du Québec c. Canada (Procureur général)*, [2010] J.Q. no 8868, 2010 QCCS 4215 (Que. C.S.).

²⁷ *Canada (Procureur général) c. Chambre des notaires du Québec*, [2014] J.Q. no 2296, 2014 QCCA 552 (Que. C.A.).

²⁸ *Chambre des notaires*, *supra*, note 1, at paras. 25-26.

²⁹ *Id.*, at para. 27.

³⁰ *Id.*, at para. 28.

³¹ *Id.*, at para. 30.

³² *Id.*, at para. 34.

Having found that a seizure took place, the Court then proceeded to consider the second question under section 8: whether the seizure was unreasonable. The Court first noted that “the usual balancing exercise” under section 8, which involves weighing individual privacy interests against the state’s interest in the search or seizure, is not “particularly helpful” given solicitor-client privilege’s status as “a principle of fundamental justice and a legal principle of supreme importance”.³³ Additionally, the Court reiterated its previous jurisprudence instructing that “any legislative provision that interferes with professional secrecy more than is absolutely necessary will be labelled unreasonable”³⁴ and observed “[a]bsolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case”.³⁵

Given the very restrictive test set up by the Court, it is perhaps unsurprising that the requirement procedure, insofar as it involves requests made to legal professionals, was found to give rise to unreasonable seizures contrary to section 8.³⁶ In reaching this conclusion, the Court relied on several constitutional “defects” in the requirement procedure that had been identified by the courts below:³⁷

1. The “client is given no notice of the requirement”.
2. There is “an “inappropriate burden” placed solely on the notary or lawyer concerned” to claim privilege.
3. It is not “absolutely necessary” to compel disclosure of the information being sought.
4. “[N]o measures have been taken to help mitigate the impairment of professional secrecy.”

Although in prior cases, the Court had emphasized that requiring judicial pre-authorization “is, in itself, an important protection against improper search and seizure of privileged material” from lawyers’ offices, the Court in this case explicitly stated that judicial pre-authorization is not necessary to render the regime constitutionally compliant.³⁸

³³ *Id.*, at paras. 36-37.

³⁴ *Id.*, at para. 38.

³⁵ *Id.*

³⁶ *Id.*, at para. 38.

³⁷ *Id.*, at paras. 44-61.

³⁸ *Id.*, at para. 52.

Having found that the requirement procedure gave rise to constitutionally intolerable risks that solicitor-client information would be either inadvertently or intentionally disclosed without the client's knowledge, the Court proceeded to consider the constitutionality of section 231(1)'s definition of solicitor-client privilege. As the Court itself observed, this additional analysis was necessary because, even if legislative amendments were made to correct the four defects noted above, the fact that section 231(1) deemed lawyer accounting records non-privileged meant that materials which would otherwise be considered privileged at common law could still be disclosed to tax authorities under a reformed regime.³⁹ For example, although amending the regime to require client notice would provide more protection against lawyers either negligently or intentionally disclosing privileged information without the client's knowledge, a different type of risk would still remain with the continuing presence of section 231(1): that the lawyer (now with notice to the client) would be required to provide the tax authorities with materials that would be considered privileged but for the idiosyncratic definition of privilege within this regime.

In considering the constitutionality of this definition, the Court again emphasized the importance of privilege and articulated a restrictive version of the test of absolute necessity:

...[A] legislative provision cannot, by abrogating professional secrecy, authorize the state to gain access to information that is normally protected, where the abrogation is not absolutely necessary to achieve the purposes of the legislation. If the provision does so, the seizure will be unreasonable and contrary to s. 8 of the *Charter*. This rule prevents the state from giving itself, with a clear intention to create a statutory exception to professional secrecy, the authority to gain untrammelled access to documents that are normally privileged even though the state's operations are facilitated only minimally by access to the information.⁴⁰

In applying this test to the definition in section 232(1), the Court focused on the "broad and undefined" nature of the accounting exception. It did not identify any persuasive arguments for why, in order to achieve the purposes of the ITA, it would be absolutely necessary to set

³⁹ *Id.*, at para. 70. Another important layer to this aspect of the case is the fact that the Court released a companion case the same day — *Thompson, supra*, note 2 — wherein it held that, a matter of ordinary statutory interpretation, s. 232(1) constituted a valid exception to solicitor-client privilege.

⁴⁰ *Id.*, at para. 81.

aside professional secrecy for such a wide range of documents.⁴¹ The Court also expressed concern about the information obtained through this permissive definition being possibly used for collateral purposes, noting that “[t]here appear to be no restrictions on sharing the information with government agencies and other public players as long as the CRA does so for a purpose related to the administration or enforcement of the *ITA*.”⁴²

In view of the broad nature of the exception and the possibility for significant collateral consequences, the Court held that the accounting records exception found in section 232(1)’s definition of solicitor-client privilege infringed section 8 of the Charter.⁴³ With respect to section 1, the Court acknowledged that the *ITA* has a pressing and substantive objective, “namely, the collection of taxes”, but found that the three provisions could not be saved under section 1 because they were not minimally impairing for the reasons provided in the Court’s section 8 analysis.⁴⁴ In terms of remedy, the Court ordered that the statutory provisions be read down to exclude notaries and lawyers from their scope of operation and invalidated the exception for a lawyer’s accounting records set out in the definition of “solicitor-client privilege.”⁴⁵

IV. ANALYSIS

The Court’s analysis in this case does not mark a radical departure from its previous jurisprudence on solicitor-client privilege. The bottom line remains the same: the Court views solicitor-client privilege as very important and will protect it. Notwithstanding this continuity, the means used to defend solicitor-client privilege in *Chambres des notaires* are worth considering more closely. As in *Canada (Attorney General) v. Federation of Law Societies of Canada*,⁴⁶ the Court here relies on Charter rights typically used to protect individuals from excessive or otherwise inappropriate government interferences to insulate the lawyer-client relationship from government intrusions. The result is an awkward fit.

In *Federation of Law Societies of Canada*, the Court considered the constitutionality of provisions in the Federal Government’s anti-money laundering and terrorist financing legislation which sought to: (1) impose

⁴¹ *Id.*, at paras. 77-87.

⁴² *Id.*, at paras. 86-87.

⁴³ *Id.*, at para. 78.

⁴⁴ *Id.*, at paras. 88-91.

⁴⁵ *Id.*, at paras. 92-95.

⁴⁶ *Federation of Law Societies of Canada, supra*, note 2.

on lawyers new obligations to collect and keep information about their clients; and (2) expose lawyers to the possibility of warrantless searches of their offices by government officials. The Court found that the provisions breached sections 7 and 8 of the Charter. In the *Federation of Law Societies* case, the Court's section 8 analysis largely rested on the failure of the regime to prevent the "significant risk that at least some privileged material will be found among the documents that are the subject of the search powers in the Act" because the searches were warrantless and there was no requirement that documents be sealed before being examined or removed from the lawyer's office.⁴⁷ The Court's section 7 analysis identified and applied a new principle of fundamental justice: "commitment to a client's cause".⁴⁸ In finding a section 7 violation, the Court contended that the regime's requirement that lawyers collect and retain information about their clients that was unnecessary for "ethical and effective representation" and with respect to which there were insufficient protections for solicitor-client privilege would unacceptably "reduce [client] confidence ...in the lawyer's ability to provide committed representation."⁴⁹ The themes of risk management and client trust that appear in *Federation of Law Societies* result in muddled constitutional analysis.⁵⁰ A similar fate befalls the Court in *Chambre des notaires*.

Drawing on its previous jurisprudence on law office searches, the Court in both cases stipulates that the government needs to provide stringent safeguards to avoid the inadvertent disclosure of privileged information when it seeks to obtain documents or information from lawyers' offices. In *Chambres des Notaires*, the Court also stresses the need for the Government to exhaust all other possible alternatives before it seizes material from a lawyer's office:

[W]e find that the entire requirement scheme is flawed in that it authorizes a seizure that cannot be characterized as a measure of last resort. In the context of a seizure involving information or documents that may be protected by the professional secrecy of notaries or lawyers, this presents a problem.

⁴⁷ *Federation of Law Societies*, *supra*, note 2, at para. 42. In its s. 8 analysis, the Court drew heavily on its previous jurisprudence on law firm office searches, namely: *Lavallee, Rackel & Heintz*, *supra*, note 6.

⁴⁸ *Federation of Law Societies*, *id.*, at paras. 74-111.

⁴⁹ *Id.*, at paras. 108 and 109.

⁵⁰ Salyzyn, "A False Start", *supra*, note 8.

We agree that the problem in this case is not as acute as in *Lavallee* or *FLS*, which involved physical searches of law offices. The mere service of a requirement to disclose certain information or documents is not on the same scale. Nevertheless, we find that it is not absolutely necessary here to rely on notaries or lawyers rather than on alternative sources in order to obtain the information or documents being sought. For example, where the Minister seeks information about specific transactions in which the client took part, the information would be available from alternative sources, such as financial institutions, that do not have as onerous an obligation to safeguard its confidentiality. In this regard, there is no evidence that the Minister even tried, albeit unsuccessfully, to obtain the information in question by alternative means before issuing a requirement to a legal adviser.⁵¹

The high threshold established here aligns with the Court's entrenched position that solicitor-client privilege must be vigorously protected. However, there is an incongruity in using this high threshold in a section 8 Charter analysis that is statutorily tethered to the concept of "reasonableness". The conceptual means that the Court uses to get around this — simply deeming "any legislative provision that interferes with professional secrecy more than is absolutely necessary" to be "unreasonable" for the purposes of section 8 — seems analytically unsatisfactory. Allowing the Government to engage in all reasonable searches and seizures (as the plain wording of section 8 directs) seems to be fundamentally different than setting up something close to "an absolute prohibition" on government searches and seizures by requiring that they be a "last resort" (as the Court wants to do in relation to privileged material). Moreover, whatever one thinks of the conceptual coherence of this analytical move, a significant practical consequence remains: in setting such a high standard, the Court arguably presents "solicitor-client privilege as a super-constitutional right", to borrow Adam Dodek's term, which, as he notes, makes privilege "very difficult to limit" and risks generating "a constitutional straightjacket for the Court in future cases where it wants to recognize a limit on this right."⁵² And, of course, any

⁵¹ *Id.*, at paras. 58-59.

⁵² A.M. Dodek, "Constitutional Hierarchy: Solicitor-Client Privilege as a Super-Constitutional Right" (Paper delivered at the Ontario Bar Association Constitutional Law Conference, Toronto, October 19, 2003), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1548078> [hereinafter "Dodek, 'Constitutional Hierarchy'"].

“super-constitutional” status sits uneasily with the Court’s repeated rejections of a “hierarchy of [*Charter*] rights.”⁵³

In both *Federation of Law Societies* and *Chambres des notaires*, the Court resolves this challenge by falling back on the question of appropriate risk management. Notwithstanding the language of “last resort” and “absolute necessity” used, the Court clearly states in both cases that the Government could design a regime that would allow for law office search and seizures so long as it sufficiently reduces the risk for inadvertent disclosures of materials protected by solicitor-client privilege. In adding this qualification to the analysis, the Court appears to be subtly replacing necessity as the key yardstick with a test centred on sufficient risk reduction. For example, with respect to the ITA’s idiosyncratic definition of privilege, the Court in *Chambres des notaires* suggests that taking care to craft a more precise exemption that would allow tax authorities to obtain only those accounting records that they need could make this section constitutionally compliant.⁵⁴

The guidance that the Court offers on risk management is curious. Although, as noted above, the Court lists four ways in which the ITA requirement procedure is constitutionally defective, it suggests that the failure to provide client notice is the most significant:

If the client were given notice of the requirement and afforded an opportunity to independently safeguard his or her right to professional secrecy before the information was disclosed, the fact that the requirement is not sent as a last resort would not be fatal to the scheme. The risk of information protected by professional secrecy being revealed would then be minimized by the fact that the client would have an opportunity to challenge its disclosure.⁵⁵

⁵³ See, for example, *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] S.C.J. No. 15, [2005] 1 S.C.R. 238, 2005 SCC 15, at para. 26 (S.C.C.) and *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698, 2004 SCC 79, at para. 50 (S.C.C.).

⁵⁴ This sentiment is reflected, for example, in *Chambres des Notaires*, *supra*, note 1, at para. 84: The potential scope of the expression ‘accounting record of a lawyer’ is therefore problematic from the standpoint of the absolute necessity test. The exception set out in the definition of ‘solicitor-client privilege’ in s. 232(1) of the *ITA* does not distinguish the many forms that information in an accounting record can take. For now, all information in an accounting record is to be disclosed in response to a requirement regardless of the form or the content of the record. The information may therefore have nothing to do with the Minister’s power of audit and collection, and the Minister may not need it in order to achieve his or her objective under the *ITA*. In fact, nothing in the arguments of the AGC and the CRA suggests why, to achieve the purposes of the *ITA*, it would be absolutely necessary to set aside professional secrecy for such a wide range of documents rather than, for example, doing so only in respect of the amounts paid and owed by clients.

⁵⁵ *Id.*, at para. 61.

The proposal to add a client notice requirement provides Parliament with a clear and seemingly easy way to Charter-proof amended legislation in this area (provided that issues do not remain with the definition of solicitor-client privilege in the legislation). As a practical question of effective risk management, however, the premise that client notice would provide a robust safeguard against undesirable disclosure of privileged material is empirically dubious.

On one level, the Court's claim that "if the client is given notice of the requirement, the risk of privileged information being disclosed without his or her consent ... would be greatly reduced" is self-evidently true.⁵⁶ If a client is notified, it would seem more likely that the client and the lawyer would discuss the requirement, either because the client himself or herself contacts the lawyer or the lawyer, seeing that the client is copied, proactively reaches out to explain the requirement. Practically speaking, however, there is a real question as to whether, in many cases, the decision-making process would be substantially different when a client is copied on a requirement.

The Court contends that, when a client is not copied, there are "many reasons" why a legal professional might not adequately protect a client's right to keep privileged material confidential, including an honest but mistaken belief that the materials are not privileged, a self-regarding concern about being prosecuted for a failure to disclose or simply forgetting to verify whether any of the requested material is protected by privilege.⁵⁷ On reflection, these types of risks are unlikely to be substantially mitigated by client notice in many cases. The question of which client materials are privileged can be legally complex. If a client is faced with a lawyer who either mistakenly or self-interestedly tells him or her that the requested documents should be disclosed, the client is apt to defer to his or her lawyer, who, of course, the client is paying to be an expert on the law. Given the importance of solicitor-client privilege, consent in this context must be robustly informed. Where a client is merely deferring to his or her lawyer as an expert on the law of privilege, a client may be consenting, but only in the most superficial sense. In practical terms, providing client notice may do very little to better facilitate the client's ability to meaningfully enforce his or her right to prevent privileged materials from being disclosed to tax authorities.

⁵⁶ *Id.*, at para. 52.

⁵⁷ *Id.*, at paras. 55-56.

To be sure, even if client notice would not materially change the risk of disclosure of privileged material, one can imagine the argument that any remaining risk is not “unreasonable” for the purposes of a section 8 analysis in light of the fact that, to use the Government’s words, the “Canadian tax system is based on the principle of self-reporting and self-assessment, which means that the tax authorities must rely on broad powers of audit to ensure the system’s integrity.”⁵⁸ At this point, however, we loop back to the problem of incongruity between the Court’s strong rhetoric about solicitor-client privilege and the reasonableness analysis under section 8. The level of risk that would remain with an added client notice requirement is hard to square with the Court’s pronouncement that “any legislative provision that interferes with professional secrecy more than is absolutely necessary will be labelled unreasonable”.⁵⁹

This is particularly true given the Court’s explicit refusal to mandate judicial pre-authorization for ITA seizures from lawyers’ offices or even the much less onerous step of first requesting documents from other possible sources, like financial institutions. Regardless of one’s position on the ultimate merits of a more relaxed approach, everyone should be concerned with an inconsistent constitutional analysis that posits the most stringent possible test of “absolute necessity” but then measures government interferences against a much lower standard. If the Court is uncomfortable with the implications of the “constitutional straight-jacket” it has created by constitutionalizing solicitor-client privilege it would be healthier to evaluate this doctrinal move at a first-principles level, rather than trying to Houdini out of this self-imposed constraint.⁶⁰

Additionally, the Court seems to have painted itself into a corner by suggesting, in its analysis of the ITA’s definition of solicitor-client privilege, that it might be constitutionally permissible to allow the Government to search and seize material that would otherwise be considered privileged, so long as the enabling legislation is sufficiently precise in exempting the material at issue and the search or seizure can be characterized as “absolutely necessary to achieve the purposes of the legislation.”⁶¹ Surely, precision and necessity cannot be the only applicable criteria? If solicitor-client privilege is, in fact, a rule with

⁵⁸ *Id.*, at para. 3.

⁵⁹ *Id.*, at para. 38.

⁶⁰ The term “constitutional straightjacket” comes from Dodek, “Constitutional Hierarchy”, *supra*, note 52.

⁶¹ *Chambres des Notaires*, *supra*, note 1, at para. 81.

“deep significance and a unique status in our legal system”,⁶² “a civil right of supreme importance in the Canadian justice system”,⁶³ and “a principle of fundamental justice”,⁶⁴ among other things, one would imagine that it takes more than precise legislative drafting and a close connection to legislative purpose (regardless of what that legislative purpose might be) in order to legislatively derogate from it.

Moreover, the jurisprudence that has considered lawyer regulation in the context of section 7 of the Charter does not offer a useful alternative to consider the constitutionality of state interferences in the lawyer-client relationship. In this jurisprudence, the issue of client trust replaces risk management as the governing concept. In both *Federation of Law Societies* and *Chambres des notaires*, the Court expressed concern about lawyers’ offices being treated as “archives” for government authorities seeking information about clients.⁶⁵ In the *Federation of Law Societies* case, the majority repeatedly emphasized in its section 7 analysis the need for clients to have confidence that their lawyers are operating with undivided loyalty and are providing “committed representation”.⁶⁶ In support of its conclusion that the regime in that case violated section 7, the majority in the *Federation of Law Societies* case found:

...The reasonable and well-informed client would see his or her lawyer being required by the state to collect and retain information that, in the view of the legal profession, is not required for effective and ethical representation and with respect to which there are inadequate protections for solicitor-client privilege. Clients would thus reasonably perceive that lawyers were, at least in part, acting on behalf of the state in collecting and retaining this information in circumstances in which privileged information might well be disclosed to the state without the client’s consent. This would reduce confidence to an unacceptable degree in the lawyer’s ability to provide committed representation.⁶⁷

The ITA’s requirement procedure gives rise to similar concerns and, thus, implicates the new principle of fundamental justice declared in the *Federation of Law Societies* case: the lawyer’s duty of commitment to a client’s cause. However, several commentators, including myself, have

⁶² *Id.*, at para. 28.

⁶³ *Id.*, at para. 5.

⁶⁴ *Id.*, at paras. 28, 37.

⁶⁵ *Federation of Law Societies*, *supra*, note 2, at para. 75; and *Chambres des Notaires*, *supra*, note 1, at para. 60.

⁶⁶ *Federation of Law Societies*, *id.*

⁶⁷ *Id.*, at para. 109.

argued that the majority's section 7 analysis in *Federation of Law Societies* and, in particular, its use of this new principle of fundamental justice is an awkward fit for the Court's legitimate concerns about state interference in lawyers' work.⁶⁸ It is unfortunate that the Court did not take the opportunity in *Chambres des notaires* to try to resolve these issues or, in the alternative, acknowledge that there are intractable problems with using "commitment to a client's cause" as a principle of fundamental justice. If the Government does amend the ITA requirement procedure to require client notice with a view to making it Charter compliant, a section 7 challenge may well be part of any subsequent case brought by legal regulators. It would have been helpful for the Court to provide at least some guidance as to what section 7 might require in these circumstances.

V. CONCLUSION: INDEPENDENCE OF THE BAR AS A WAY OUT?

By constitutionalizing solicitor-client privilege, the Court has powerfully reinforced the importance of this concept to the proper functioning of our legal system and has given itself a new tool to protect the lawyer-client relationship from state interference. But, now, with more than a decade of this constitutionalization behind us, it is becoming more and more apparent that individual Charter rights, such as sections 7 and 8, are an awkward mechanism to insulate the lawyer-client relationship from government interference.

The question of when the government can impose demands on the lawyer-client relationship for its own ends — whether it be preventing money laundering or collecting taxes — inextricably involves a consideration of what independence of the bar means and why it is important. At stake in cases like *Chambres des notaires* and *Federation of Law Societies* is the degree to which clients can access legal services unimpeded by inappropriate interference by the state. This access is the key interest protected by solicitor-client privilege. As stated by the Court: "The lawyer's obligation of confidentiality is necessary to preserve the fundamental relationship of trust between

⁶⁸ A. Woolley, "Lawyers' Representation, Lawyers' Regulation and Section 7 of the Charter" ABlawg.ca (February 23, 2015) online: <<http://ablawg.ca/2015/02/23/lawyers-representation-lawyers-regulation-and-section-7-of-the-charter/>>; Woolley, "Fundamental Justice", *supra*, note 8; Salyzyn, "A False Start", *supra*, note 8.

lawyers and clients.”⁶⁹ Access to legal services is also the interest that the Court sought to protect in recognizing “commitment to a client’s cause” as a new principle of fundamental justice in *Federation of Law Societies*. There, the Court proclaimed: “...A client must be able to place ‘unrestricted and unbounded confidence’ in his or her lawyer; that confidence which is at the core of the solicitor-client relationship is a part of the legal system itself, not merely ancillary to it.... The lawyer’s duty of commitment to the client’s cause, along with the protection of the client’s confidences, is central to the lawyer’s role in the administration of justice.”⁷⁰

Once we recognize, as we must, that the state has some interest in what goes on in the lawyer-client relationship — no one argues, for example, that lawyers should be their clients’ “dupes” or criminal “accomplices” to use the language in the *Federation of Law Societies* case — it is necessary to articulate the boundary between appropriate and inappropriate government interference in the lawyer-client relationship.⁷¹ To articulate this boundary, one needs a clear understanding of independence of the bar and why it is important. As Alice Woolley and others have explained, the Court’s jurisprudence lacks such an understanding.⁷² At the very least, the Court’s continued constitutional consideration of the limits of state interference in the lawyer-client relationship requires that independence of the bar be foregrounded and that a more sophisticated understanding of this concept be presented.

The analytical problems raised in this article show no sign of disappearing any time soon. It has been suggested that the federal government is currently looking at ways to amend its anti-money laundering and terrorist financing regime to make it constitutionally compliant as it applies to lawyers.⁷³ Lawyer regulators are apt, no doubt, to challenge any amended legislation. Moreover, given the Court’s signalling in *Chambres des notaires* that a minor change of providing client notice and a more precise definition of solicitor-client privilege could render the regime at issue constitutionally compliant in relation to legal professionals,

⁶⁹ *Chambre des notaires*, *supra*, note 1, at para. 39; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d’élimination des déchets (SIGED) inc.*, [2004] S.C.J. No. 18, 2004 SCC 18, [2004] 1 S.C.R. 456, at para. 34 (S.C.C.).

⁷⁰ *Federation of Law Societies*, *supra*, note 2, at para. 83.

⁷¹ *Id.*, at para. 93.

⁷² See, for example, Woolley “Lawyers and the Rule of Law”, *supra*, note 8.

⁷³ See, for example, S. Cooper, “Battle over lawyers’ money-laundering loophole shapes up in B.C.”, *Vancouver Sun* (February 26, 2017), online: <<http://vancouver.sun.com/news/national/b-c-a-battleground-for-lawyer-loophole-cases>>.

it seems possible that we might see new legislation in this area as well. The upshot of more refined legislation may be pressure on the Court to provide a more sophisticated analysis of how the Constitution protects the lawyer-client relationship. Alternatively, the Court may simply retreat into more familiar doctrinal concepts, regardless of any resulting analytical muddle. Time will tell which route will be taken.

